SUPREME COURT, U. S.
FILED
MICHAEL RODAK, JR.

In The

Supreme Court of the United States

October Term, 1974

No. 74-1074

Ida H. Willey, et al.,

Petitioners,

vs.

James F. Garnsey, et al., Trustees of the Village of Ilion,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

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References

39 NY Jur. Sec. 232, pages 336-337

10 ALR 3d 397

In The

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October Term, 1974

No.

Ida H. Willey, et al.,

Petitioners.

vs.

James F. Garnsey, et al., Trustees of the Village of Ilion,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK

I.

Opinions Below

The memorandum of the Supreme Court, State of New York, County of Herkimer dismissing the petition is not officially nor unofficially reported. Copy appended.

The opinion of the Supreme Court, State of New York, Appellate Division, Fourth Department is officially reported in 45 A.D. 2d 227 (Fourth Dep't., 1974). Copy appended.

II.

Jurisdiction

The judgment of the Court of Appeals, State of New York was made and entered November 27, 1974. Copy appended. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

III.

Questions Presented

Is a substantial question of due process and equal protection raised by a Village Board the majority of whom are economically benefited by the passage of an ordinance of zone change which devalues plaintiffs homes.

IV.

Constitutional Provisions Involved

The constitutional provisions involved are (1) the due process and equal protection clauses of the fourteenth amendment to the United States Constitution and (2) the establishment clause of the first amendment to the same.

V.

Statement

Petitioners are home owners and residents of the Village of Ilion, Herkimer County, New York abutting the area rezoned by the defendants, trustees of the Village of Ilion, in October, 1972. The change was from R-10 (one family dwellings) to Planned District Special thus allowing multi-family structures.

The land rezoned is the property of the (Roman Catholic) Church of the Annunciation of Ilion which had purchased it many years ago for a cemetery. The Church sold 16 acres to a private commercial corporation "Ilion Associates", on condition

the latter would be able to obtain a zone change, hence the rezoning ordinance involved.

The great majority of the village board were Roman Catholic members of the above church to be benefited. They had direct economic ties to the transaction as well through children in a parochial school whose tuition would be affected, and in the church to be benefited. They were under great pressure due to the poor economic position of the church and its school, with which some board members were associated. The adoption of the rezoning ordinance was publicly made a matter of Church economic and spiritual necessity both from the pulpit and by direct solicitations of the Senior Pastor and his assistants both on and off Church premises and before, during and after weekly services. Further, those who opposed the change were publicly castigated from the pulpit as lacking spiritual values and affection for the church. A full, organized campaign was developed to rezone the land. (see Appendix A-4 portion of Verified Petition claiming constitutional question)

In this atmosphere the clear line of separation between church and state was unconstitutionally breached with some members of the Village Board using their official positions to promote their religious affiliations, respond to the economic needs of the church and thereby fail to observe the official impartiality required of constitutional due process and equal protection of the law. Since benefit to the church is of direct economic benefit to its members who are simultaneously members of the Village Board it is clear that the constitutionally mandated fairness and equality of treatment required of state officials was wanting.

The lower court overlooked the requirements that any interest in legislation be disclosed, and the fact none was disclosed, ruled that no constitutional issue existed (p 13 memorandum opinion Judge O'Donnell).

The Appellate Division of the Supreme Court of New York, Fourth Department, in which the conclusions of the Supreme Court, Herkimer County affirmed. Appended.

The Court of Appeals, State of New York, granted a motion for dismissal of a request for permission to appeal on the ground that no substantial constitutional question is directly involved. Order of 27th November 1974. Appended.

VI.

Reason for Granting the Writ

The writ should be granted because:

(1) The case can be used to establish the rule for the various states. At present New York is one of a minority of states finding no constitutional rights involved.

(2) This case offers the opportunity to spell out citizens constitutional protection against a governmental body where the deciders have a direct financial interest adverse to the petitioners.

The decisions in the courts below have substantially overlooked important constitutional questions involving the first and fourteenth amendments. This Court has decided many cases involving the questions of prayer in the public schools, the busing of church-related school students at public expense, the public support of such schools and so on but it has never precisely drawn the constitutional line between the permissible and impermissible in the matter of favorable treatment of churches by zoning boards or other public agencies engaged in such planning.

Whether due process has failed by reason of board members' not disqualifying themselves as in position of conflicting private interests vis-a-vis their public duties is another issue of great constitutional importance.

Likewise the question of the petitioners having received the equal protection of the law as constitutionally required must be decided.

This case is unique in that all these constitutional mandates converge in the same facts. Regardless of which label is chosen an illegal breach has occurred; conflict of interest reaches constitutional dimensions when individual loyalties are divided between state and church such that what appears to be the disinterested act of the former is not only not simply coincidentally favorable to the latter but designedly so.

It is insufficient to dismiss this claim on the observation that legislators are subject to lobbying pressures. Such common knowledge is not in issue; what is in issue is how far legislators may go in yielding to such pressures before the state becomes impermissibly partisan. When legislators' commitments become acts of the state those acts must lie within constitutional bounds; when convictions of the legislator become decisions of the state the latter must pass constitutional muster.

The challenged interest was membership in the person to be benefited by the change, and direct personal economic interest funds available to a church to which they or their family make contributions, and/or in the cost of education of their children in parochial schools where they were paying tuition, whose amount would be affected by available monies.

This interest was required by local rule adopted pursuant to State statute to be disclosed on the record and was not.

In any event, such an interest is a disqualification.

The Court of Appeals stated the test as a public policy test and held:

> "Public policy forbids the sustaining of municipal action founded upon the vote of a member of the Municipal governing body today in any matter before it *which directly or immediately affects* him individually." (Emphasis added)

Barker v. Marley, 8 NY(2) 365, 367; Accord 39 NY Jur. Sec. 232, page 336-337.

Across the nation the evolving law on this point shows an ethical concern for the integrity of the legislative process from any adverse interest direct or indirect.

At 10 ALR 3d 397, the reporter citing *Smith et al v. Zoning Bd. of the City of Stamford*, 151 Conn. 489, 199 A2d 690 (1964); *Daly v. Town Plan and Zoning Commission*, 150 Conn. 495, 191 A2d 250 (1963), states,

> "A member of the planning board who was also a member of the church which owned the land and was interested in having it rezoned so that it would be purchased by the applicant for reclassification was held in *Zell v. Roseland* (1956) 42 NJ Supra 75, 125 A2d 890, to have at least an indirect personal interest in the matter of the proposed amending ordinance so that he should have disqualified himself, his personal interest having infected and invalidated the action of the board in which he participated."

New York Courts have applied these concepts to zoning. In *Saber Realty Corp. v. Silver*, 25 Misc. 2d 261 (1960), the Court noted with approval that the chairman of the local board of zoning appeals had disqualified himself since he was a member of the temple seeking the subject decision.

No public officer with a direct or indirect personal or pecuniary interest in the outcome of the case should participate in the matter.

Impartiality to decide the public interest is also destroyed by previous commitments and being subjected to other social pressures.

These propositions have widespread recognition. *Montgomery County Board of Appeals v. Walker*, 228 Md. 574, 180 A2d 865 (1962); *Barbara Realty Co. v. Zoning Board of Review*, 85 RI 152, 128 A2d 342 (1957); *McNamara v. Saddle River*, 60 NJ Supra 367, 158 A2d 722, aff'd 64 NJ Supra 426, 166 A2d 391 (1960).

For a public official to attend church and be castigated from the pulpit in full view of other members, to observe committees formed, and be advised that he is expected by his co-members to help them obtain money from his public actions is something that is obviously coercive and which the balance of the community must view with alarm. These matters were presented to this court under verified oath procedures.

Conclusion

For these reasons the petitioners submit that they be heard and the writ of certiorari be issued.

Respectfully submitted,

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APPENDIX A-1

Memorandum Decision of State of New York, Supreme Court, Herkimer County

STATE OF NEW YORK — SUPREME COURT
County of Herkimer

In the Matter of IDA H. WILLEY; BEATRICE L. CARTER; HARRY C. CARTER; ANDREW L. LARSEN; ELLEN H. LARSEN; ROBERT H. WALKER; PAULINE WALKER; JEANNIE BENNETT; RALPH ECKER; DAVID CONOVER; MARION CONOVER; CHARLES COOKE; LUCELIA COOKE; HARRY CLIFFORD; BESSIE CLIFFORD; OTTO TOMEI; THERESA TOMEI,

Petitioners

—vs—

JAMES F. GARNSEY; ROBERT J. REYNOLDS; JAMES SPELLMAN; JOSEPH L. KINVILLE; HAROLD H. RIDDELL, Trustees of the VILLAGE OF ILION, NEW YORK, as the BOARD OF TRUSTEES,

Respondents

For Judgment under CPLR, Article #78, and Declaratory Relief

APPEARANCES:

CARROLL and CARROLL, Attorneys-at-Law, of 918 Onondaga Savings Bank Building, Syracuse, New York 13202, Attorneys for the Petitioners.

JACK MANLEY, Attorney-at-Law, 97 West Street, Ilion, New York 13357, Attorney for the Respondents

O'DONNELL, J:

MEMORANDUM

The Petitioners, real property owners in the Village of Ilion, New York bring an Article 78 Proceeding and also recite in their moving papers, Declaratory Judgment, challenging the action of the Village Board of Trustees of the Village of Ilion. The Petitioners are property owners, owning adjoining and abutting property to Sixteen (16) acres of land, presently owned by the Roman Catholic Church of Ilion, the Annunciation Church. The Church, many years ago, purchased the particular property for cemetery land and it has since been undeveloped over these years. The Annunciation Church proposes to transfer Sixteen (16) acres of land to a corporation known as "Ilion Associates" for the construction of multi-family dwellings on the site and the site will be known as "Ilion Gardens". In conjunction with the proposed transfer, the Village Board passed a Resolution seeking to change the zoning districts of the Village of Ilion in the following manner: This tract which was presently designated as R-10 Residential District to Planned District Special, pursuant to Section 30.16 of the Ilion Municipal Code. The matter was referred to the Ilion Planning Board and Findings of Fact and a subsequent Resolution approving the change was completed. A Notice of Public Hearing was conducted to amend the Ilion Zoning Map and District and subsequently an ordinance was passed amending the Zoning Law to identify the new area as Planned District Special.

The Petitioners, still in error in his Pleadings although he identifies the papers as a Declaratory Judgment in an Article 78 Proceeding, it is in essence a Petition and a Notice of Motion brought in the form of an Article 78 Proceeding. It is well settled law that an Article 78 Proceeding should not be utilized to review legislative action. *The Matter of Southern Dutchess Country Club v. Town Board of the Town of Fishkill 18 N. Y. 2nd 870; Matter of Paliotto v. Cohalan 8 N. Y. 2nd 1065; Matter of Neddo v. Chrade 270 N. Y. 97; Matter of Brent v. Hoch 13 A. D. 2nd 505.* Since the Court has obtained jurisdiction over the parties,

the matter will not be dismissed solely upon the grounds that it is not the proper form, but the Court shall make whatever proper Order that is required for its proper disposition. *CPLR 103 (c); Matter of Lakeland District v. Onondaga Authority 24 N. Y. 2nd 400.* The Petitioners raised the following issues, in the following order: It is the contention that the ordinance was not properly published; that the action of the Board was tainted with illegality in that the majority of the Board were members of the Roman Catholic Church of the Annunciation; that substantial pressure and duress was exerted to obtain the necessary change in zoning and attempting to throw the full strength of the Church and Parishioners behind the zoning change. It is the contention of the Petitioners that the members of the Board had a direct or indirect interest in the outcome of the proceeding, both monetarily and emotionally and that it represents a conflict of interest in violation of the law and further violation of the Code of Ethics of the Village of Ilion.

This argument is without merit in the Court's view, since there is no showing on the part of the Petitioners that the members of the Village Board, although parishioners or members of the Church of the Annunciation, had any direct or indirect interest in changing the zoning ordinance nor does it show that there appears to be any conflict. The Court is well appraised that all legislative bodies, whether it be a Village Board, Board of Legislatures or Assembly are subject to the pressures of lobbying groups having an interest in the changing of the laws of the particular body. It is pointed out in the Respondent's Affidavit that none of the Board Members were Trustees of the Church involved and the Court must point out to parties that under Section 92 of the Religious Corporation Law, title to real estate resides of the diocese. In the sense he is the Trustee thereof for religious uses, but there is no declaration of trust, he controls enjoinment and transmits title by devise. The purpose of this arrangement is to exclude the laity from the power of interferrence. *Baxter v. McDownell 155 N. Y. 83.* There appears to

be no violation of Article 18 of the General Municipal Law as to conflicts of interest. Nowhere do the facts disclose a conflict of interest which would be associated with actions of Village Boards such as in *Baker v. Marley 8 N. Y. 2nd 365. Matter of Clarke v. Town of Russia 283 N. Y. 272.* It is the opinion of this Court that the Petitioners argument of conflict of interest or violation of Code of Ethics, has no merit in order to nullify the action on the part of the Village Board.

The Petitioners challenge the legality of the zoning ordinance change and accuse the Board of spot zoning.

The Petitioners pray for a declaration that the amendment to the Zoning Ordinance of the Village of Ilion, enacted on October 6, 1972, changing the zoning classification of the Annunciation Church property, from a R-10 Residence District to a PDS-Planned District Special classification, is unconstitutional as being Spot Zoning.

The Church property on Barringer Road, in the Village of Ilion, which has been rezoned consists of a tract of land of approximately Sixteen (16) acres of land in size, known as the "Ilion Gardens" Middle Income Housing Development.

The application for a rezoning of the above parcel was referred to the Ilion Planning Board of July 25, 1972, along with the plans and specifications and the Planning Board, after due consideration and deliberation, approved said application and filed its report with the Village Board of Trustees; the application was then referred to the Herkimer County Planning Board on August 7, 1972 and they have also approved the proposed change in zoning.

The Resolution amending the Zoning Ordinance was passed on October 2, 1972 by the Board of Trustees of the Village of Ilion at a public hearing, due notice of the time and place of said public hearing having been previously published in the Evening Telegram on September 12, 1972.

The Petitioner's contention that said actions constitute spot zoning and that the Zoning Amendment should be declared invalid is without merit.

The oft-quoted text book definition of the term "Spot Zoning" is found in the lucid opinion of Justice Fuld in the case of *Rodgers v. Village of Tarrytown 302 N. Y. 115 at p. 123.*

Spot zoning was, "Defined as the process of singling out a small parcel of land for use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners, (citing cases)". "Spot zoning is the very antithesis of planned zoning, therefore, an ordinance enacted in accordance with a comprehensive zoning plan, is not "Spot Zoning", even though it (1) singles out and effects but one small plot or (2) creates in the center of a large zone small areas or districts devoted to a different use. Thus, the relevant inquiry is not whether the particular zoning under attack consists of areas fixed within larger areas of different use, but whether it was accomplished for the benefit of individual owners rather than pursuant to a comprehensive plan for the general welfare of the community."

The Village of Ilion has embarked upon an Urban Renewal Program and prior thereto has had occasion to employ an Architectural and Planning Firm to formalize a comprehensive master plan for the development of the community. Based upon the comprehensive zoning master plan and, after giving due deliberation and consideration to it, the Planning Board made the following salient findings: That the Village of Ilion has a mere twenty-five (25) building lots available and that there have only been three (3) new private homes built in the Village in the past two (2) years; that local construction costs and economic conditions are a deterrent to private home construction; that there is a housing crisis in the Village and a definite need for low cost, middle income housing units of the type proposed by the developer in the instant case; that furthermore, the developer

plans to construct Town House type apartment houses on ten and one half (10 1/2) acres of the sixteen (16) acre tract rezoned; that these Town Houses would actually be individual adjoining two story homes, each having its own private front and back yard; that said development as proposed could furnish one hundred fifty (150) residential units and fill the need for low cost middle income housing for the Village, that the proposed design of the multi-family Town House type construction, "Ilion Gardens", would aesthetically not only fit in with the existing character of the neighborhood but also would improve its appearance, that finally, having considered all of the possible areas for such a development, the Annunication Church site was the only feasible site left available. Therefor, it cannot be said in this instance, that the rezoning of this tract of land was the "very antithesis of planned zoning". In fact, the amendment, is the very thesis of master-comprehensive planned zoning.

The Rodgers case, stated that an ordinance enacted in accordance with a comprehensive plan was not Spot Zoning, even though it singled out and affected one small plot or tract. Professor Robert Anderson, in his treatise, *Zoning Law and Practice in New York State page 87 states:* "Although the size of the area subject to a zoning amendment is not the only factor considered in determining whether the measure constitutes spot zoning, it appears to be the most important single factor. This conclusion is supported numerically, and by the language used by the Courts in their discussions of spot zoning problems. Thus, a writer for a Law Review examined one hundred twenty-five (125) cases in which the term "Spot Zoning" was used in describing the alleged defect in a zoning ordinance. In all of the cases, the area subject to the legislation in issue was small in comparison to the zone which existed prior to the amendment. The largest area changed was thirteen (13) acres. In short, the charge of spot zoning is made only where the area changed by the amendment is small".

The tract of land in issue in the instance case consists of some sixteen (16) acres.

The Petitioners raise the issue as to the benefit accruing to the Annunication Church as a grounds for declaring the legislation invalid.

Incidential benefit or detriment of the owners, either of the rezoned property or of neighborhood property, is generally of no direct consequence in determining the validity of legislation rezoning a parcel or a small block of land, provided, of course, the legislation does not amount to an unlawful confiscation of the affected realty by operating to prevent the use thereof for any reasonable purpose. Depreciation in value of neighborhood property and special hardship of the owners thereof are insufficient to invalidate a zoning amendment which promotes the general welfare. *Hudson v. Town of Oyster Bay 248 A. D. 737, 288 N. Y. S. 627.*

"The ultimate question, therefor, is not whether or not there was benefit to the owners of the rezoned property and detriment to neighboring property owners, but whether or not the intent and effect of the legislation was to arbitrarily discriminate rather than to promote the public welfare. If such was the intent and effect of the legislation, the act is an arbitrary and improper exercise of legislative power, in that it offends against the due process and the equal protection clauses of the constitutions and is not justified in the exercise of the police power. It is fundamental that valid zoning legislation must find its justification in the exercise of the police power in the interest of the public". *Freeman v. City of Yonkers 129 N. Y. S. 2nd 703.*

Clearly, although there is an incidental benefit to the Annunciation Church, there is also a greater benefit derived by the community, which in the determination of the Village Board is in need of middle income housing.

Persons who own property in a particular zone or use district have no eternally vested right to that classification and the village may amend a basic ordinance so as to reasonably promote the general welfare.

In any area of even moderate density, comprehensive and balanced zoning is essential to the health, safety and welfare of the community. The task of achieving this goal devolves upon the local legislative body, and its judgment must be allowed to control if the classification is "fairly debatable". *Yukers v. The Amber Realty Company, 272 U. S. 365, 47 S. C. 114, 71 Lawyers Edition 303.* In other words, the Courts may not interefere unless the local bodies' determination is arbitrary, and the burden of establishing such arbitrariness is imposed upon him who asserts it. *Rodgers v. Village of Tarrytown, Supra.*

These principles apply with equal force to rezoning, where there is presented the additional problem of adjusting a durable and uniform zoning pattern to altered conditions, whether local or county.

"While stability and regularity are undoubtedly essential to the operation of zoning plans, zoning is by no means static. Changed or changing conditions call for changed plans, and persons who own property in a particular zone or use district enjoy no eternally vested right to that classification if the public interest demands otherwise. Accordingly, the power of a village to amend its basic zoning ordinance in such a way as reasonably to promote the general welfare cannot be questioned". *Rodgers v. Village of Tarrytown 302 N. Y. 115 at page 121.*

While hardships may be imposed on this or that owner, "Cardinal is the principal that what is best for the body politic in the long run must prevail over the interest of particular individuals". *Shepard v. Village of Skaneateles 300 N. Y. 115, 118.*

It is the opinion of this Court, that the action of the Village was a valid exercise of power to change the zoning law of the Village of Ilion.

The last argument of the Petitioners raise the issue that the tax resolution was an illegal preference granted to Ilion Associates, which is classified as a limited profit company. The Court is not going to pass upon the merits of this particular resolution since the motion in this instance is premature, since the legislative act of the Village Board has not been augmented and put into operation. At first blush it appears that this corporation is not entitled to the usual tax relief, such as a local housing authority who pays "Shelter Rents", nor is it a religious or educational institution, which would be entitled to tax relief; but at the present standing, the Church presently owns the property and it is tax exempt under the law, and until the title to this property vests in the Ilion Associates and the Board of Assessors fixes an assessment upon the property, there is not presently a justiciable issue to be determined. *Prashker v. United States Guarantee Co. 1 N. Y. 2nd 584.*

The Petition be and hereby is dismissed, without prejudice to the Petitioners to, in the future, challenge the tax preference resolution if it is augmented and placed into operation and in that instance, the Petitioners should not review it under Section 78 of the CPLR, but rather by an action for a Declaratory Judgment, since it constitutes a legislative act.

Prepare Order accordingly.

JAMES P. O'DONNELL
Justice of the Supreme Court

Dated: Herkimer, New York
June 11, 1973

APPENDIX A-2

Opinion of Supreme Court, State of New York, Appellate Division, Fourth Department

SUPREME COURT -- STATE OF NEW YORK
Appellate Division — Fourth Department

In the Matter of Ida H. Willey, et al.,

Appellants,

vs.

James F. Garnsey, et al., Trustees of the Village of Ilion, New York, as the Board of Trustees,

Respondents.

#394/1974

ARGUED: May 23, 1974
DECIDED: July 5, 1974

PRESENT:
HON. JOHN S. MARSH, *Presiding Justice*

HON. REID S. MOULE,
HON. RICHARD J. CARDAMONE,
HON. WALTER J. MAHONEY,
HON. FRANK DEL VECCHIO, *Associate Justices*

APPEAL from Judgment of the Herkimer Special Term, O'Donnell, J., entered July 18, 1973, in Article 78 proceeding to annul zoning ordinance.

APPEARANCES:

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OPINION

CARDAMONE, J.:

On October 6, 1972 the Board of Trustees of the Village of Ilion passed a resolution changing the zoning of 16 acres from R-10, a residential one-family house zone, to Planned District Special (PDS). On October 24, 1972 a real estate tax preference was enacted by the Board of Trustees setting maximum taxes on the proposed development of the 16 acres. The unimproved real property in question is owned by the Roman Catholic Church of Annunciation of Ilion which contracted to sell to the developer. The Village of Ilion Planning Board examined the preliminary plans of a developer who intended to put town-house type dwellings on the property. After hearing statements and testimony from the developer and other interested parties, the Planning Board recommended the zoning change to the Board of Trustees which effectuated it by unanimous resolution. Appellants, owners of adjoining property, commenced proceedings in the Herkimer County Supreme Court to invalidate the actions of the Board of Trustees. Although the matter was improperly commenced in part as an Article 78 proceeding (Matter of Southern Dutchess Country Club v. Town of Fishkill, 18 N Y 2d 870) the Supreme Court correctly treated the proceeding as an

action for declaratory judgment (CPLR § 103(c)). In affirming we agree with the conclusions reached by the court below but note that certain issues raised below and on appeal were not determined below. We consider them here.

First, appellants point out that the zoning ordinance limits the use of the PDS classification to developments "not otherwise distinguishable under any previous classification". They argue that the proposed development is an apartment complex which is permitted under the R-6 and R-3 classifications of the zoning ordinances and therefore the use of PDS is not authorized. We find nothing in the regulations for R-6 which would permit the development here planned. Whether a town-house complex of the size here in question fits within the R-3 classification is a matter of interpretation. R-3 districts allow "multiple-family dwellings" as a permitted use. "Multiple dwelling" is defined in the Municipal Code for the Village of Ilion (§ 30.2(27)) as:

> "A building used or designed as a residence for three (3) or more families living independently of each other and doing their own cooking therein, including apartment houses, apartment hotels, flats and group houses."

The proposed development is of approximately 150 "individual adjoining two-story homes each with its own private front and back yard". In our opinion it was neither unreasonable nor arbitrary for the Board of Trustees to conclude that such a development should not be characterized as a "multiple dwelling" for purposes of the zoning ordinance. Inasmuch as the Board is the local legislative body its judgment in this regard is conclusive (Rodgers v. Village of Tarrytown, 302 N.Y. 115.)

Appellants also argue that the zoning ordinance permitting the establishment of Planned Development Districts constitutes an invalid delegation of the Village Board's power to the Village Planning Board. The procedures for establishing a Planned Development District require application by the developer to the Village Board which refers the matter to the Planning Board for

its recommendation. The Planning Board can require changes in the developer's plans to meet the requirements of the zoning ordinance, to protect the existing or permitted uses in the vicinity and to promote and protect the orderly growth and sound development of the village. The Planning Board also sets the minimum lot size, maximum building height, minimum yard dimensions, etc., of a Planned District Special classification. In reaching a decision on a proposed development the Planning Board is required to consider a list of ten relevant criteria set forth in the Ordinance. The Planning Board's ultimate decision is a recommendation only to the Village Board which retains the power to make the final decision. The Planning Board acts in an advisory capacity only. Under such circumstances we conclude that there is no delegation of legislative authority to the Planning Board.

Appellants also raise the issue of the propriety of the publication of the change in the zoning ordinance, suggesting that it should have been published twice instead of once in the official newspaper. Section 20 of the Village Charter (as amended in 1970) requires publication of the ordinance only once and that was done in this case.

We also find to be without merit the appellant's claim that a restriction in the church's deed to the premises, providing that no business establishment be erected thereon, prevents the proposed development. Aside from the fact that the proposed use is not a "business establishment" (see Vandershoot v. Kocher, 190 Misc. 1) the appellants have no legal standing to enforce the restrictive covenant. There is no showing that appellants or any of them were parties to the conveyance between the church and its grantor or have any right of enforcement by way of the deed or the existence of a common plan of subdivision (Steinmann v. Silverman, 14 N Y 2d 243; Lauber v. Martin, 37 A D 2d 754).

The judgment should therefore be affirmed.

Marsh, P.J., Moule, Mahoney and Del Vecchio, JJ., concur.

APPENDIX A-3
Judgment of Court of Appeals
State of New York

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the twenty-seventh day of November A. D. 1974.

PRESENT, HON. CHARLES D. BREITEL, *Chief Judge, presiding.*

Mo. No. 943
In the Matter of

Ida H. Willey & ors.,

Appellants,

vs.

James F. Garnsey & Oors., Trustees &c.,

Respondents.

For Judgment &c.

A motion having heretofore been made herein upon the part of the respondents to dismiss the appeal taken by the appellants in the above cause to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the appeal dismissed, without costs, upon the ground that no substantial constitutional question is directly involved.

/s/ JAMES M. FLAVIN
Clerk

APPENDIX A-4

Declaratory Judgment and Article 78

SUPREME COURT — STATE OF NEW YORK
HERKIMER COUNTY

In the Matter of Ida H. Willey, Beatrice L. Carter, Harry C. Carter, Andrew L. Larsen, Ellen H. Larsen, Robert H. Walker and Pauline Walker, Jeannie Bennett, Ralph Ecker, David Conover, Marian Conover, Charles Cooke, Lucelia Cooke, Harry Clifford, Bessie Clifford, Otto Tomei, Theresa Tomei,

Petitioners

—*vs*—

James F. Garnsey, Robert J. Reynolds, James Spellman, Joseph L. Kinville, Harold H. Riddell, Trustees of the Village of Ilion, New York, as the Board of Trustees,

Respondents

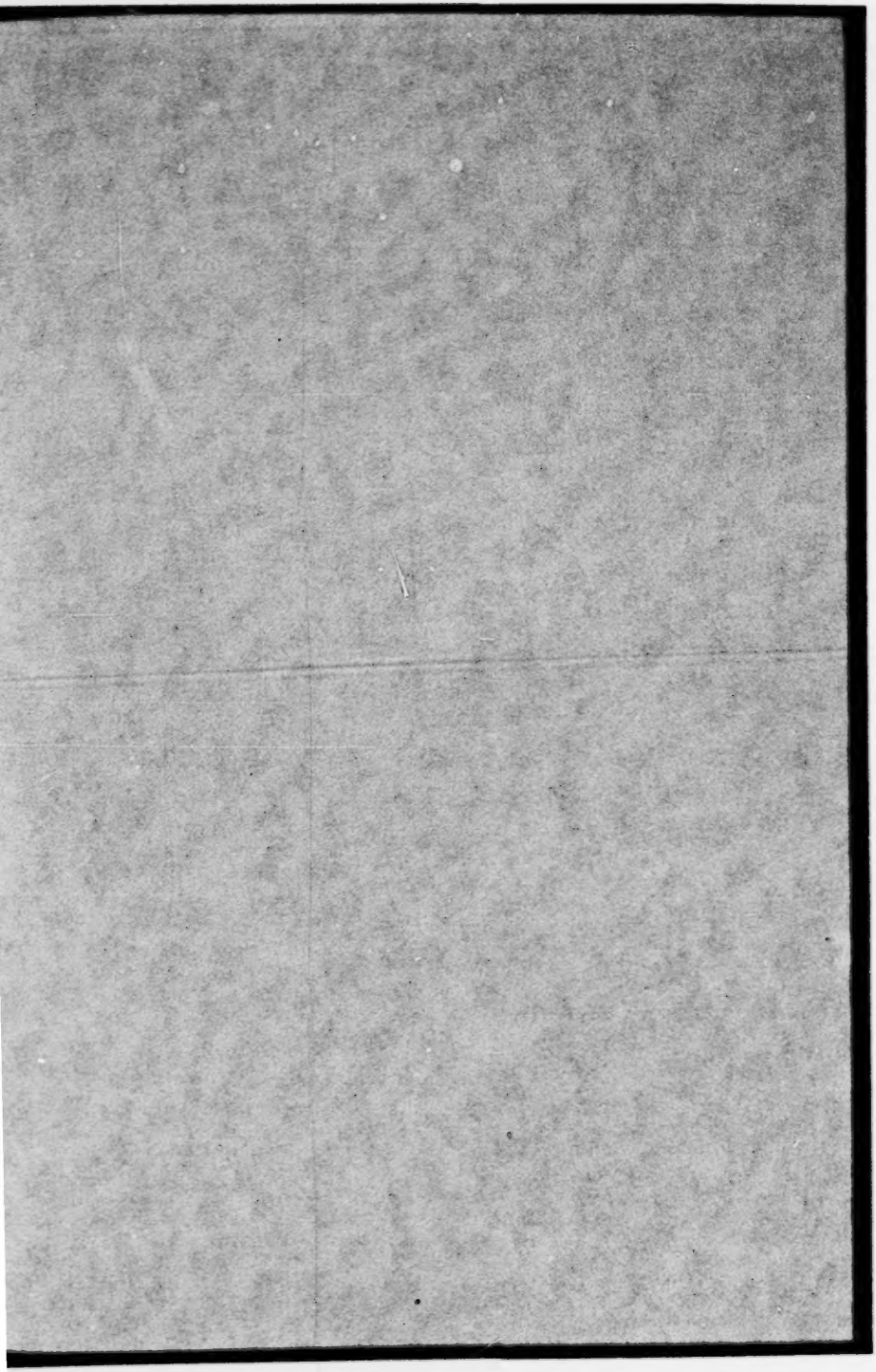
for judgment under CPLR article #78, and Declaratory Relief.

The petitioners for a Petition and Complaint against the Respondents pursuant to CPLR section 7801 et seq. and CPLR Section 3001 et. seq. allege and show to the Court as a first cause of action as follows:

* * * * *

6. That such practices if allowed, place some citizens and their rights at the mercy of the locally mighty and powerful, and constitute a violation of the due process and equal protection clauses of the State and Federal Constitution.

* * * * *



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IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-1074.

IDA H. WILLEY, *et al.*,

Petitioners,

vs.

JAMES F. GARNSEY, *et al.*, TRUSTEES OF THE VILLAGE OF ILION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-1074.

IDA H. WILLEY, *et al.*,

Petitioners,

vs.

JAMES F. GARNSEY, *et al.*, Trustees of the Village of Ilion,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, STATE OF NEW YORK.

BRIEF FOR RESPONDENTS IN OPPOSITION.

I.

Jurisdiction.

The statute (28 U.S.C. §1257) provides that "final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed (by certiorari) by the Supreme Court" under specified circumstances.

It has been held, however, that a party seeking a writ of certiorari must show that he has taken all available steps to secure review by the highest court of the State (*Gorman v. Washington University*, 316 U. S. 98, 62 S. Ct. 962, 86 L. Ed. 1300). This petitioners have failed to do.

The petitioners did appeal to the New York Court of Appeals as a matter of right (New York Civil Practice Law and Rules, §5601) from the order of the Appellate Division. Thereafter, the Court of Appeals did dismiss the appeal so taken (petition, p. 21).

There is, however, an alternate method of invoking the jurisdiction of the New York Court of Appeals which petitioners failed to pursue. They could have moved in the Court of Appeals within thirty days after the order of dismissal was made for permission to appeal (New York Civil Practice Law and Rules, §§5513, 5514 and 5602). Such permission shall be granted on questions of law when required in the interest of substantial justice (New York State Constitution, Art. 6, Sec. 3b [6]).

In implementing this constitutional mandate, it has been held that leave to appeal should be granted where the determination of the case involves important questions of statutory construction (*James Howden & Co. v. American Condenser Corp.*, 195 App. Div. 882, affd. 231 N. Y. 627); or where the question is novel and of first impression (*Corbett v. Scott*, 243 N. Y. 66); or where the questions of law are of public importance (*Corbett v. Scott*, 215 App. Div. 763, affd. 243 N. Y. 66); or affect large public interests (*Fire Dept. v. Wendell*, 13 Daly 427).

If petitioners had sought permission from the New York Court of Appeals for permission to appeal in the interest of substantial justice and had demonstrated to that court as they now contend (petition, pp. 4 to 7) that this case presents novel questions of law that should be reviewed, it well may be that permission to appeal would have been granted.

This court passed on substantially the identical issue in *Southern Electric Co. v. Stoddard*, 269 U. S. 186, 46 S. Ct. 71, 70 L. Ed. 227. There application was made to the New York State Appellate Division—the intermediate appellate court—to certify that a question of law was involved which ought to be reviewed by the New York Court of Appeals. When this motion was denied petitioner neither made an application to the Court of Appeals for permission to appeal nor appealed as a matter of right. A motion to dismiss the writ of error was granted.

It is submitted that petitioners having failed to establish that they have exhausted all possibilities afforded by New York State procedures for review of the judgment, the application should be denied.

II.

Statement of the Case.

This counterstatement of the case is made as a basis for the contentions to be hereinafter presented that certiorari should not be granted because (a) any federal questions asserted by petitioners are either insubstantial, or (b) not actually presented by the record, or (c) if it might be found that the lower court's decision may have been based partly on a substantial federal question, the decision also rested on an adequate independent non-federal ground.

Petitioners commenced a proceeding in Supreme Court, Herkimer County, in part as one under Article 78 of New York Civil Practice Law and Rules in the nature of certiorari against a public officer or body but requested judgment declaring the rights of the parties which

is statutorily in the nature of a plenary action (New York Civil Practice Law and Rules, §§ 3001, 3017 [b]).

The trial court noted the defect in the proceeding but pursuant to New York Civil Practice Law and Rules, Section 103 (c), treated the case as one for declaratory judgment (petition, pp. 9-10) and the Appellate Division approved the action (petition, pp. 18-19).

The petition in the lower court contained numerous factual allegations upon which it was asserted that the actions of the Village Board were "tainted with illegality" (petition, herein, pp. 22, 23). All of these, with single exception, were nonfederal grounds. In the last paragraph it was asserted that "such practices * * * constitute a violation of the due process and equal protection clauses of the State and Federal Constitution" (petition, herein, p. 23).

Respondents in the basic proceeding filed an answer wherein the material factual allegations of the petition were denied.

In this posture of the case petitioners should have sought a preliminary trial, either before the court or a jury of these disputed questions of fact. Thus, in *Rockland Power Co. v. New York*, 289 N. Y. 45, the court wrote (p. 50): "A declaratory judgment is *ex vi termini* a judgment on the merits. Until disputed 'questions of fact necessary to be determined before judgment can be rendered' are settled, it is plain that rights and legal relations cannot be determined, defined and declared."

Petitioners having failed to ask for such a trial, the lower court properly held that petitioners had failed to show that the actions of the Village Board were tainted with illegality (petition, p. 10).

In the petition herein it is asserted (p. 23) that "No factual hearing was had on these allegations. The claim was dismissed as insufficient in law." We submit that this is incorrect. The decision of the lower court shows that the facts as set forth in the moving papers and answering affidavits were considered. There was no trial thereof because of petitioners' failure to demand it.

In the remainder of its decision the lower court discussed at some length the various contentions of petitioners that the zoning change was illegal (petition, pp. 11 to 16). A reading thereof establishes that all of these were nonfederal grounds. There is not even an intimation therein that any federal question, constitutional or otherwise, was raised or presented.

The same may be said of the opinion of the Appellate Division (petition, pp. 17 to 20) which concurred in the conclusions of the trial court but went on to decide "certain issues raised below and on appeal (that) were not determined below" (petition, p. 19). Again, all of these additional contentions presented nonfederal questions.

Petitioners now assert that the substantial constitutional question presented is that "of due process and equal protection raised by a Village Board the majority of whom are economically benefited by the passage of an ordinance of zone change which devalues plaintiffs' homes" (petition, p. 2).

ARGUMENT.

A.

The federal question asserted by petitioners is not presented by the record.

Newsome v. Smyth, 365 U. S. 604, 81 S. Ct. 774, 5 L. Ed. 2d 803;
Sutter v. Midland Valley R. Co., 280 U. S. 521, 50 S. Ct. 65, 74 L. Ed. 590;
Mellon v. McKinley, 275 U. S. 492, 48 S. Ct. 34, 72 L. Ed. 390;
Erie Railroad Co. v. Kirkendall, 266 U. S. 185, 45 S. Ct. 33, 69 L. Ed. 236.

These decisions hold that the grounds presented in a petition for certiorari must have a solid basis in the record. The federal question now presented by petitioners is an afterthought. It was not presented to the trial court or intermediate appellate court. It was first injected into the litigation when petitioners tried in vain to prevent a dismissal by the New York Court of Appeals of their appeal taken as of right on alleged constitutional grounds, none of which had been presented to trial or intermediate appellate court except by a catch-all sentence in the petition that was not subsequently pursued.

B.

Assuming that a federal question was presented it was insubstantial.

Under the provisions of both Section 1257 (3) of the Judicial Code (28 U.S.C. §1257 [3]) and Rule 19 of the Supreme Court Rules, the authority of this court to review a state court judgment on certiorari depends on the existence of a substantial federal question. Moreover, Rule 19 indicates that regardless of whether the court below is a state court or a federal court there must be "special and important reasons" for granting a writ of certiorari.

These principles have been implemented not only in denying applications for writs but in dismissing writs as improvidently granted.

McClanahan v. Moraver & Hartzell, 404 U. S. 16, 92 S. Ct. 170, 30 L. Ed. 2d 136;
Palmieri v. State of Florida, 393 U. S. 218, 89 S. Ct. 440, 21 L. Ed. 2d 389;
Benz v. New York State Thruway Authority, 369 U. S. 147, 82 S. Ct. 674, 7 L. Ed. 2d 634;
Honeyman v. Hanan, 302 U. S. 375, 58 S. Ct. 273, 82 L. Ed. 312.

C.

The state court judgment sought to be reviewed is supported by adequate nonfederal grounds.

This court has repeatedly held that, even if a writ of certiorari has been granted to review a state court judgment which rests in part on the decision of a substantial federal question, the court, upon determining that the

state court judgment is also supported by an adequate independent nonfederal ground, will dismiss the writ of certiorari as improvidently granted.

Harris v. Zion's Savings Bank & T. Co., 313 U. S. 541, 61 S. Ct. 840, 85 L. Ed. 1509;
Utilities Insurance Co. v. Potter, 312 U. S. 662, 61 S. Ct. 804, 85 L. Ed. 1109;
Johnson v. Thornburgh, 276 U. S. 601, 48 S. Ct. 322, 72 L. Ed. 725;
George O. Richardson Machinery Co. v. Scott, 276 U. S. 128, 48 S. Ct. 264, 72 L. Ed. 497.

CONCLUSION.

For the foregoing reasons, respondents say that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX A-1.

New York Civil Practice Law and Rules.

§ 5601. Appeals to the court of appeals as of right.

(a) *Dissent, reversal or modification.* An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, where (i) there is a dissent on a question of law in favor of the party taking such appeal, or (ii) such order directs a reversal of the judgment or order appealed from, or (iii) such order directs a modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) *Constitutional grounds.* An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States: and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state or of the United States under the constitution of the state or of the United States.

(c) *From order granting new trial or hearing, upon stipulation for judgment absolute.* An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) *Based upon non-final determination of appellate division.* An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an administrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfies the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.

APPENDIX A-2.

New York Civil Practice Law and Rules.

§ 5513. Time to take appeal, cross-appeal or move for permission to appeal.

(a) *Time to take appeal as of right.* An appeal as of right must be taken within thirty days after service upon the appellant of a copy of the judgment or order appealed from and written notice of its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, his appeal must be taken within thirty days thereof.

(b) *Time to take cross-appeal.* A party upon whom a notice of appeal is served must take an appeal within ten days after such service or within the time limited by subdivision (a), whichever is longer.

(c) *Time to move for permission to appeal.* The time within which a motion for permission to appeal must be made shall be computed from the date of service upon the party seeking permission of a copy of the judgment or order to be appealed from and written notice of its entry, or, where permission has already been denied by order of the court whose determination is sought to be reviewed, of a copy of such order and written notice of its entry, except that when such party has served a copy of such judgment or order and written notice of its entry, the time shall be computed from the date of such service. A motion for permission to appeal must be made within thirty days.

§ 5514. Extension of time to take appeal or to move for permission to appeal.

(a) *Alternate method of appeal.* If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

(b) *Disability of attorney.* If the attorney for an aggrieved party dies, is removed or suspended, or becomes physically or mentally incapacitated or otherwise disabled before the expiration of the time limited for taking an appeal or moving for permission to appeal without having done so, such appeal may be taken or such motion for permission to appeal may be served within sixty days from the date of death, removal or suspension, or commencement of such incapacity or disability.

(c) *Other extensions of time; substitutions or omissions.* No extension of time shall be granted for taking an appeal or for moving for permission to appeal except as provided in this section, section 1022, or section 5520.

§ 5602. Appeals to the court of appeals by permission.

(a) *Permission of appellate division or court of appeals.* An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, or

(ii) from a final judgment of such court or final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601: and

2. in a proceeding instituted by or against one or more public officers or a board, commission or other body of public officers or a court or tribunal, from an order of the appellate division which does not finally determine such proceeding, except that the appellate division shall not grant permission to appeal from an order granting or affirming the granting of a new trial or hearing.

(b) *Permission of appellate division.* An appeal may be taken to the court of appeals by permission of the appellate division:

1. from an order of the appellate division which does not finally determine an action, except an order described in paragraph two of subdivision (a) or subparagraph (iii) of paragraph two of subdivision (b) of this section or in subdivision (c) of section 5601:

2. in an action originating in a court other than the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right pursuant to paragraph one of subdivision (b) of section 5601, or

(ii) from a final judgment of such court or a final determination of such agency where the appellate division has made an order on a prior appeal in the action which necessarily affects the final judgment or determination and the final judgment or determination is not appealable as of right pursuant to subdivision (d) of section 5601, or

(iii) from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

APPENDIX A-3.

New York Civil Practice Law and Rules.

ARTICLE 78—PROCEEDING AGAINST BODY OR OFFICER.

§ 7801. Nature of proceeding.

Relief previously obtained by writs of certiorari to review, mandamus or prohibition shall be obtained in a proceeding under this article. Wherever in any statute reference is made to a writ or order of certiorari, mandamus or prohibition, such reference shall, so far as applicable, be deemed to refer to the proceeding authorized by this article. Except where otherwise provided by law, a proceeding under this article shall not be used to challenge a determination:

1. which is not final or can be adequately reviewed by appeal to a court or to some other body or officer or where the body or officer making the determination is expressly authorized by statute to rehear the matter upon the petitioner's application unless the determination to be reviewed was made upon a rehearing, or a rehearing has been denied, or the time within which the petitioner can procure a rehearing has elapsed; or

2. which was made in a civil action or criminal matter unless it is an order summarily punishing a contempt committed in the presence of the court.

[Sec. 7802. Parties. Omitted as not pertinent.]

§ 7803. Questions raised.

The only questions that may be raised in a proceeding under this article are:

1. whether the body or officer failed to perform a duty enjoined upon it by law; or

2. whether the body or officer proceeded, is proceeding or is about to proceed without or in excess of jurisdiction; or

3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence.

[Sec. 7804. Procedure. Omitted as not pertinent.]

[Sec. 7804. Stay. Omitted as not pertinent.]

§ 7806. Judgment.

The judgment may grant the petitioner the relief to which he is entitled, or may dismiss the proceeding either on the merits or with leave to renew. If the proceeding was brought to review a determination, the judgment may annul or confirm the determination in whole or in part, or modify it, and may direct or prohibit specified action by the respondent. Any restitution or damages granted to the petitioner must be incidental to the primary relief sought by the petitioner, and must be such as he might otherwise recover on the same set of facts in a separate action or proceeding suable in the supreme court against the same body or officer in its or his official capacity.

APPENDIX A-4.

New York Civil Practice Law and Rules.

§ 3001. Declaratory judgment.

The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds.

§ 3017. Demand for relief.

* * *

(b) *Declaratory judgment.* In an action for a declaratory judgment, the demand for relief in the complaint shall specify the rights and other legal relations on which a declaration is requested and state whether further or consequential relief is or could be claimed and the nature and extent of any such relief which is claimed.

APPENDIX A-5.

New York Civil Practice Law and Rules.

§ 103. Form of civil judicial proceedings.

* * *

(c) *Improper form.* If a court has obtained jurisdiction over the parties, a civil judicial proceeding shall not be dismissed solely because it is not brought in the proper form, but the court shall make whatever order is required for its proper prosecution.

APPENDIX A-6.

New York State Constitution.

ARTICLE VI.

* * *

§ 3. [*Jurisdiction of court of appeals.*]

a. The jurisdiction of the court of appeals shall be limited to the review of questions of law except where the judgment is of death, or where the appellate division, on reversing or modifying a final or interlocutory judgment in an action or a final interlocutory order in a special proceeding, finds new facts and a final judgment or a final order pursuant thereto is entered; but the right to appeal shall not depend upon the amount involved.

b. Appeals to the court of appeals may be taken in the classes of cases hereafter enumerated in this section:

In criminal cases, directly from a court of original jurisdiction where the judgment is of death, and in other criminal cases from an appellate division or otherwise as the legislature may from time to time provide.

In civil cases and proceedings as follows:

* * *

(6) From a judgment or order entered upon the decision of an appellate division of the supreme court which finally determines an action or special proceeding but which

is not appealable under paragraph (1) of this subdivision where the appellate division or the court of appeals shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals. Such an appeal may be allowed upon application (a) to the appellate division, and in case of refusal, to the court of appeals, or (b) directly to the court of appeals. Such an appeal shall be allowed when required in the interest of substantial justice.